Supreme Court, U.S.
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No. 92-591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,

Petitioner,

-v.-

JOHN M. POINDEXTER,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF INDEPENDENT COUNSEL ARLIN M. ADAMS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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Independent Counsel Arlin M. Adams submits this brief *amicus curiae* in support of the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

INTEREST OF THE *AMICUS CURIAE*

This Office of Independent Counsel was established on March 1, 1990 pursuant to 28 U.S.C. § 593, the Ethics in Government Act, by the Special Division of the United States Court of Appeals for the District of Columbia.[1/] The original mandate and subsequent amendments charge this Office with investigating whether the former Secretary of the Department of Housing and Urban Development ("HUD") and others may have conspired to defraud the United States, or committed other federal crimes in connection with the administration of various HUD programs. The Office has been granted the investigative and prosecutorial authority described in 28 U.S.C. § 594.

We believe that the court below erred in ruling that the word "corruptly" in 18 U.S.C. § 1505 is unconstitutionally vague. That holding has adversely affected this Office's charging decisions in fulfilling its responsibilities under the Special Division's mandate. Moreover, the ruling invites, and has resulted in, the challenge to other, similarly worded statutes, which if successful could result in the impairment or defeat of pending prosecutions by this Office as well as the abandonment of possible future prosecutions. This Office of Independent Counsel accordingly has a substantial interest in the Court's review and reversal of the decision of the court of appeals.

1/ Under the terms of his appointment, the Independent Counsel is authorized to exercise all powers of the Attorney General and other officers of the Department of Justice, including the power to appear in any court proceeding he considers necessary. 28 U.S.C. § 594(a)(1). The Independent Counsel appears in the name of the United States. Id. § 594(a)(9). Accordingly, we believe that, under Rule 37.5 of the Rules of this Court, consent to the filing of this brief *amicus curiae* is not required. Should the Court determine otherwise, we will move for leave to file this brief, or file the necessary consents.

ARGUMENT

We agree with and join in the reasons given in the petition why the decision of the court of appeals is incorrect. Our purpose here is to substantiate the petitioner's forecast (at 14) that the decision below "will have very significant practical consequences" for the administration of justice. Indeed, it has already had such consequences, as we shall demonstrate.

Our investigation so far has led to pleas of guilty to the commission of various federal crimes by three defendants, and the indictment of eight other defendants. Three of those eight are currently being tried. Four others are scheduled to be tried in December 1992 and January 1993. For the remaining defendant no trial date has been set. We are continuing to investigate whether other individuals may have conspired against the United States or committed other federal crimes; these ongoing investigations may result in additional charges.

1. Violations of § 1505 Have Gone and Will Go Uncharged.

A significant portion of this Office's investigation has focused on the extensive testimony regarding various HUD programs heard by congressional committees, including the committee whose hearings led to this Office's establishment. See Hearings before the Employment And Housing Subcommittee of the Committee on Government Operations of the House of Representatives, 101st Cong., 1st and 2nd Sess. (1989-1990). We believe that the testimony of some witnesses at those hearings violated § 1505, in that those witnesses "corruptly * * * influence[d], obstruct[ed], or impede[d] or endeavor[ed] to influence, obstruct, or impede" Congress' inquiries. But because the decision below has removed this instrument for protecting (and punishing

efforts to undermine) the integrity of congressional investigations, we have necessarily forgone charging these witnesses under § 1505. Our decisions in this respect have been adversely affected both as to defendants who have already entered pleas of guilty and to defendants who are currently under indictment.

Moreover, this Office is continuing to investigate the testimony of certain witnesses before congressional committees. Based on our past experience and on what now seems to be the promise of those investigations, it appears that the decision below will shield still other individuals from being charged with violations of § 1505.

The conduct that we believe is outlawed by a reasonable construction of § 1505 is not necessarily covered either by 18 U.S.C. § 1001, for the reasons stated in the petition (at 14-15), or by the federal perjury statute, 18 U.S.C. § 1621, which does not reach testimony that is deliberately and deceptively incomplete or misleading yet falls short of being demonstrably untrue. Hence in the matters under this Office's jurisdiction, and in other cases in which the Justice Department is responsible for enforcement, individuals who are guilty of obstructing Congress may escape prosecution if the decision below is permitted to stand.

2. Litigation Over Similarly Worded Statutes Has Already Started.

The indictments in some of this Office's pending cases include, and possible indictments in future cases brought by this Office may include, counts charging one or more violations of 18 U.S.C. § 1503. That section makes it a crime "corruptly" to "influence[], obstruct[], or impede[], or endeavor[] to influence, obstruct, or impede, the due administration of justice." The defendant in one of those

pending cases, charged in two counts of violating § 1503, has challenged the constitutionality of that statute, relying on the decision below and arguing that, "[u]nder the reasoning of Poindexter, a person's own lying [to a grand jury] cannot constitute an obstruction of the due administration of justice."[2/]

We believe that § 1503 is surely constitutional. First, the court of appeals' construction in this case of § 1505 is erroneous. Second, the differences between the two statutes are sufficient to sustain the constitutionality of § 1503 in any event. But the important point for present purposes is that the mischief of the decision below has already spread to at least one of the seventeen other federal criminal statutes that use the word "corruptly" to define an element of the offense. See Petition at 15-16 & nn. 13, 14. More litigation, in other circuits over the constitutionality of § 1505, and everywhere over the other seventeen statutes, is a certainty. Timely guidance from this Court may head off that litigation completely, or, at the least, announce principles that will minimize the uncertainty to litigants and the judicial burdens that may otherwise be anticipated.

3. Review of the *Kastigar* Issue is Also Warranted.

The court of appeals' construction of the requirements of *Kastigar v. United States*, 406 U.S. 441 (1972), does not so directly affect this Office's responsibilities as does the invalidation of § 1505. But it is nonetheless clear that the *Kastigar* ruling will create grave

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2/ Defendant Cruse's Memorandum of Law in Support of Motion to Dismiss Counts Two and Four of the Indictment, filed October 16, 1992, at 5, in *United States v. Victor R. Cruse*, Cr. No. 92-0136 (NHJ) (D.D.C.). Trial in this case is scheduled to commence on January 11, 1993. The motion to dismiss is pending.

problems in the prosecution of defendants whose activities have prompted Congress' exercise of its investigative responsibilities. As the petition points out (at 21-23 and 26-29), the court of appeals has imposed an overly stringent standard under which prosecutors, without use of any circumstantial evidence, must affirmatively rule out any possibility that an immunized defendant's testimony has "in some way influenced" a witness. Pet. App. at 15a. This absolute standard would be considered harsh in any circumstance -- especially where the party carrying the burden is called upon to prove a negative -- and it is particularly unwarranted in criminal conspiracies, where mendacious witnesses can often be expected to tailor their testimony to benefit their co-conspirators.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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